

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 16, 2008 Session

**JOSEPH BAILEY, ET AL. v. BLOUNT COUNTY BOARD OF EDUCATION,
ET AL.**

**Appeal from the Circuit Court for Blount County
No. L-15716 W. Dale Young, Judge**

No. E2007-01028-COA-R3-CV - FILED AUGUST 27, 2008

A nontenured teacher employed by the Blount County Board of Education was suspended for ten days without pay upon charges of inappropriate conduct. Several months later, upon further charges of inappropriate conduct, the Board terminated the teacher's employment. The teacher and his wife filed a complaint alleging injuries as the result of actions and omissions of the Board with respect to both the suspension and the termination. Upon the Board's motion for summary judgment, the trial court dismissed the complaint with prejudice upon the ground that the plaintiffs failed to exhaust all administrative remedies before filing suit, and, by separate order, upon its finding that the plaintiffs were aware of this failure when they filed their complaint, the trial court sanctioned the plaintiffs for filing a frivolous complaint. After careful review, it is our determination that the Board's decision terminating the teacher's employment was void ab initio because the Board denied the teacher due process by neglecting to afford him a hearing prior to such termination. Accordingly, we modify the trial court's summary judgment with respect to that portion of the complaint pertaining to the termination to dismissal without prejudice upon the ground that the matter complained of was not ripe for appeal, and we further vacate the trial court's order imposing sanctions on the plaintiffs. We affirm the trial court's grant of summary judgment as to that portion of the complaint pertaining to the teacher's ten-day suspension upon the ground that suit in that regard was barred under the applicable statute of limitations.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part and
Affirmed as Modified in Part; Cause Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the appellants, Joseph Bailey and Pamela Bailey.

Robert N. Goddard, Maryville, Tennessee, for the appellees, Blount County Board of Education and Alvin Hord, both officially, in his capacity of Director of Schools, and individually.

OPINION

I. Background

The appellant, Joseph Bailey, was employed by the Blount County Board of Education (“the Board”) as a nontenured teacher at Heritage High School. In March of 2006, the Board suspended Mr. Bailey for ten days without pay because of sexually inappropriate remarks he allegedly made to a female student.

The following school year, on November 1st, the Board suspended Mr. Bailey with pay, pending investigation into a complaint of sexual harassment and inappropriate behavior filed against him by a fellow teacher, based upon the contents of an email she had received from Mr. Bailey. A few days later, Dr. Jane Morton, the Board’s human rights officer and complaint manager, sent Mr. Bailey a letter enclosing a copy of an additional email exchange that had allegedly transpired between Mr. Bailey and another fellow teacher. These emails included comments by Mr. Bailey pertaining to sexual matters, and the Board deemed these comments inappropriate. Inter alia, Dr. Morton advised Mr. Bailey of his right to submit a written response to the complaint and that upon receipt of such response, she would meet with Alvin Hord, the Blount County Director of Schools, who would make recommendations about Mr. Bailey’s job placement. On November 29, 2006, Mr. Bailey’s attorney, Kevin Shepherd, faxed a letter to Mr. Hord that acknowledged receipt of the copies of the additional emails attached to Dr. Morton’s letter, disputed their relevance to the pending complaint, and requested an opportunity to be heard on the complaint “before any disciplinary measures are taken.”

By memorandum dated November 29, 2006, Dr. Morton recounted the pending allegations and supporting evidence against Mr. Bailey to Mr. Hord and advised Mr. Hord that she recommended Mr. Bailey’s “[d]ismissal from employment from Blount County Schools.” Mr. Hord promptly sent Mr. Bailey the following letter dated November 30, 2006:

I have reviewed the information from a recent investigation into a complaint of sexual harassment and inappropriate conduct filed against you by a teacher at Heritage High School. I have also reviewed documents obtained in the course of that investigation (emails between you and another teacher at Heritage High School). In addition, I have read the letters I received from Mr. Kevin Shepherd regarding his legal representation.

Findings from the investigation support the charges of improper conduct for the following reasons:

Your behavior (including an email) toward a female teacher created an uncomfortable work environment, although the email itself does not specifically meet the definition of sexual harassment.

You used school email to correspond with another female teacher, in which you named specific students and described sexual activities of those students, which you state had been disclosed to you.

You are dismissed from employment with Blount County Schools as of this date, for improper conduct.

Board of Education Policy 5.202 provides the opportunity for you to request a hearing before a Personnel Hearing Officer. Under the policy you have the right to be represented by counsel; call and subpoena witnesses; examine all witnesses and require that testimony be given under oath. Requests for a hearing must be filed in writing within ten (10) days of this notification. The written request for a hearing should be presented to me.

It is not disputed that Mr. Bailey's employment was terminated on November 30, 2006, as stated in this letter.

On December 5, 2006, Mr. Shepherd faxed Mr. Hord a letter requesting a hearing in regards to the Board's decision to terminate Mr. Bailey's employment, and on January 9, 2007, a hearing was held on the charges against Mr. Bailey before a personnel hearing officer. Although Mr. Bailey chose not to attend this hearing, his attorney appeared on his behalf, cross-examined witnesses, and argued in his favor. Thereafter, by letter dated January 18, 2007, the personnel hearing officer advised Mr. Bailey that the decision to terminate his employment would be upheld.

On January 31, 2007, Mr. Shepherd sent Mr. Hord a letter advising the Board that Mr. Bailey would be appealing the personnel officer's termination decision to the school board. However, by subsequent letter dated February 26, 2007, Mr. Shepherd advised the Board's attorney that Mr. Bailey would dismiss his appeal to the school board. The letter indicated that Mr. Bailey desired to present additional evidence in his defense and explained that "an appeal of this matter [to the school board] does not seem advisable of [sic] at this time, especially based upon your previous correspondence to me that no new evidence would be accepted." Two days later, the appeal to the school board was dismissed in accord with Mr. Bailey's request.

On March 9, 2007, Mr. Bailey and his wife, Pamela Bailey, filed a complaint in the Blount County Circuit Court against the Board and Mr. Hord, both individually and in his official capacity as Director of Schools. The complaint sets forth the Baileys' version of the events which led to Mr. Bailey's suspension for ten days without pay in March of 2006 and the termination of his employment in November of 2006. Inter alia, the complaint, as amended on April 20, 2007, charges that Mr. Bailey was wrongfully discharged from his job, asserts that the Board and Mr. Hord failed to conduct an adequate and fair investigation of the charges against Mr. Bailey, that evidence against him was obtained in violation of his privacy rights, and that his "procedural and substantive due process rights were violated" relative to both the March suspension and the November termination.

The complaint requests damages based upon allegations that, as a result of the actions of the defendants, Mr. Bailey has suffered “stress, anxiety, sleeplessness, and loss of his employment opportunity” and that Mrs. Bailey has suffered “shame and emotional distress.”

On May 4, 2007, the trial court granted a motion for summary judgment filed by the Board and Mr. Hord upon the ground that, as a nontenured employee in a position for which no teaching license is required, Mr. Bailey was required to exhaust all administrative remedies before filing the suit in the circuit court and he failed to do so. Thereafter, on its own motion, the trial court ordered that the Baileys show cause why they should not be sanctioned for filing a frivolous lawsuit, and on July 20, 2007, the trial court entered its order decreeing that the Baileys pay the defendants’ attorney’s fees in the amount of \$2,056.25 upon a finding “that the filing of the Complaint in this cause where the Plaintiff has not previously exhausted his administrative rights and appeals amounted to a frivolous complaint.” The Baileys appeal.

II. Issues

We address the following issues:

1) Whether the trial court erred in its summary judgment dismissal of the Baileys’ complaint relative to the Board’s termination of Mr. Bailey’s employment in November of 2006.

2) Whether the trial court erred in imposing sanctions on the Baileys upon its determination that their complaint was frivolous because they failed to exhaust all administrative remedies before filing same.

3) Whether the trial court erred in its summary judgment dismissal of that portion of the Baileys’ complaint that is based upon the Board’s suspension of Mr. Bailey’s employment in March of 2006.

III. Analysis

A. Standard of Review

Our review of the issues in this case is governed, in part, by the standard specific to the review of a grant of summary judgment and, in part, by the general standard appropriate to the review of a trial court’s decision in a non-jury case.

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. See *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Airport Props. Ltd. v. Gulf Coast Dev., Inc.*, 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. See *Bellamy v. Federal Express Corp.*, 749

S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Byrd*, 847 S.W.2d at 210; *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. *Seavers v. Methodist Med. Ctr.*, 9 S.W.3d 86, 97 (Tenn. 1999); *Hogins v. Ross*, 988 S.W.2d 685, 689 (Tenn. Ct. App. 1998). Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd*, 847 S.W.2d at 210; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. *Byrd*, 847 S.W.2d at 214.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd*, 847 S.W.2d at 215; *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to interrogatories, and admissions on file) provided by Rule 56.06 showing that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

Summary judgments do not enjoy a presumption of correctness on appeal. *See Nelson v. Martin*, 958 S.W.2d 643, 646 (Tenn. 1997); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997). Accordingly, when we review a summary judgment, we view all the evidence in the light most favorable to the non-movant, and we resolve all factual inferences in the non-movant's favor. *See Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox County Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). A summary judgment will be upheld only when the undisputed facts reasonably support one conclusion – that the moving party is entitled to a judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

Otherwise, in a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Termination

As we have noted, the Baileys' complaint is based upon alleged actions and omissions of the Board with respect to both the termination of Mr. Bailey's employment in November of 2006 and the earlier ten-day suspension of Mr. Bailey's employment in March of 2006. For reasons made clear hereinafter, we will bifurcate our review of the propriety of the trial court's summary judgment dismissal of the Baileys' complaint upon separate analyses relative to these two incidents.

We begin by addressing the issue of whether summary judgment was proper as to that portion of the complaint based upon the Board's termination of Mr. Bailey's employment by Mr. Hord as Director of Schools in November of 2006.

As we have indicated, the Board's motion for summary judgment was granted by the trial court upon the Board's argument that the Baileys' complaint, as related to the alleged wrongful termination of Mr. Bailey's employment, should be dismissed because the Baileys failed to exhaust all available administrative remedies before filing suit. In support of this argument, the Board cited Tenn. Code Ann. § 49-2-301(b)(1)(GG)(iii), which sets forth as follows the duties of an employee such as Mr. Bailey who is dismissed by a director of schools:

Any nontenured, licensed employee desiring to appeal from a decision rendered in favor of the school system shall first exhaust the administrative remedy of appealing the decision to the board of education within ten (10) working days of the hearing officer rendering written findings of fact and conclusions to the affected employee.

The Board contends that because Mr. Bailey voluntarily dismissed his appeal of Mr. Hord's decision to the Board, Mr. Bailey thereby failed to exhaust all available administrative remedies and the trial court's summary judgment dismissal in favor of the Board on that ground was correct. We do not agree.

Tennessee Code Annotated § 49-2-301(b)(1)(GG)(i) provides that "no nontenured, licensed employee under the director's jurisdiction shall be dismissed without *first* having been given, in writing" the following:

- (a) Notice of the charge or charges;
- (b) *An opportunity for a full and complete hearing before an impartial hearing officer selected by the board;*

- (c) An opportunity to be represented by counsel;
- (d) An opportunity to call and subpoena witnesses;
- (e) An opportunity to examine all witnesses; and
- (f) The right to require that all testimony be given under oath.

Tenn. Code Ann. § 49-2-301(b)(1)(GG)(i)(emphasis added).

It is clear from the record in this case that Mr. Bailey was not afforded an opportunity for a hearing as required under subsection (b) of the statute until after his employment was terminated by the Director of Schools. In this regard, we observe that the previously cited November 30, 2006, letter from Mr. Hord advising Mr. Bailey of his employment termination specifically states that Mr. Bailey is dismissed from employment as of the date of the letter, and it is not disputed that such was the effective date of the termination of Mr. Bailey's employment. Somewhat like calling "Timber" after the tree has already hit the ground, the letter then advises Mr. Bailey of his right to hearing. By dismissing Mr. Bailey from employment *before* affording him the right to a hearing, the Board acted in clear and blatant derogation of the plain language of the statute.

As a consequence of the Board's having denied Mr. Bailey due process as a result of its failure to comply with the requirements of the statute, it is our determination that the November 30, 2006, ruling of the Director of Schools terminating Mr. Bailey's employment was void ab initio. As a general matter, "[a] judgment can be void not only for lack of jurisdiction, but also where the court [or as in the instant matter, the quasi judicial body] acts in a manner contrary to due process." 46 Am. Jur. 2d *Judgments* §29 (2008); *see also In re Sergeant*, 492 N.E.2d 1259 (Ohio Com. Pl. 1976), (holding that, where employee was discharged by local board of education and was not afforded statutorily required hearing until after discharge, "it is the same as if the board did nothing," and its judgment is void ab initio."). By definition, a judgment that is void "has no legal force or effect" and "from its inception" is "absolutely null." *Black's Law Dictionary*, 848 (7th ed. 1999). Accordingly, it is our determination that Mr. Bailey's employment was never terminated. Because there was no ruling terminating Mr. Bailey's employment, the requirement that he exhaust all administrative remedies was not relevant. Under these circumstance, we make no determination as to the merits of the Baileys' complaint. We modify the trial court's summary judgment from a dismissal with prejudice upon the ground that the Baileys' failure to exhaust available administrative remedies to a dismissal without prejudice upon the ground that the matters set forth in the complaint are not ripe for appeal, there being no administrative judgment for review. The effect of our opinion is that Mr. Bailey continues, without interruption, as a nontenured teacher back to the failed termination of November 30, 2006.

C. Sanctions

By order entered June 30, 2007, the trial court determined that because of their failure to exhaust available administrative remedies, the Baileys' complaint was frivolous and sanctioned them, decreeing that they pay the Board's attorney's fees in the amount of \$2,056.25. Consistent with our above analysis and conclusions, it is our determination that this order should not have been entered, and it is, hereby, vacated.

D. Suspension

The remaining issue we address is whether the trial court erred in dismissing the Baileys' complaint to the extent that it claims damages for injuries allegedly resulting from acts and omissions of the Board relative to the ten day suspension of Mr. Bailey's employment in March of 2006. The Baileys correctly observe that the Board's motion for summary judgment only addressed the matter of Mr. Bailey's November 30, 2006 termination and failed to request dismissal of the complaint as it pertained to the earlier suspension. Thus, they argue, the trial court erred in dismissing the entire complaint and that, at least as to that portion of the complaint related to the March 2006 suspension, summary judgment was improper. We need not address the merits of this argument, having determined an alternative ground that supports summary judgment dismissal as to this aspect of the complaint.

While statutory law specifically provides for the appeal of the dismissal of an employee such as Mr. Bailey, we find no such authority, either statutory or otherwise, for the appeal of a ten day suspension of employment such as was imposed by the Board in March of 2006. Mr. Bailey's recourse under these circumstances was to file a petition for writ of certiorari. As provided by Tenn. Code Ann. § 27-8-101, "[t]he writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy." As further stated at Tenn. Code Ann. § 27-8-102, a writ of certiorari lies in a matter, such as the one before us, "[w]here no appeal is given." However, while the Baileys would have been entitled to pursue their complaint as to the ten-day suspension by filing a petition for writ of certiorari, they were allotted a limited amount of time within which to do so under Tenn. Code Ann. § 27-9-102, which requires that a party aggrieved by the order or judgment of a board functioning under state law, file the petition for writ of certiorari within sixty days from the entry of the order or judgment. Even if treated as a petition for writ of certiorari, the Baileys' complaint of March 9, 2007, was obviously filed well over sixty days past his March 2006 suspension and was, therefore, time-barred under the statute. For this reason, we conclude that the aspect of the Baileys' complaint relative to Mr. Bailey's suspension in March of 2006 was appropriately dismissed by summary judgment, although upon a ground other than that relied upon by the trial court. As we recognized in *Hill v. Lambeth*, 73 S.W.3d 131, 136 (Tenn. Ct. App. 2001), this Court may affirm a trial court's grant of summary judgment upon grounds other than those relied

upon by the lower court. Accordingly, we affirm the summary judgment dismissal of the Baileys' complaint as it pertains to the Board's ten day suspension of Mr. Bailey's employment in March of 2006.

IV. Conclusion

For the reasons stated herein, trial court's order imposing sanctions is vacated, the summary judgment of the trial court is affirmed as modified, and the cause is remanded. Costs of appeal are assessed to the parties, equally.

SHARON G. LEE, JUDGE